dictment is plenary. Its substance, however, cannot be dispensed with."

On this same subject we would call attention to the following cases. *Leasure* v. *State*, 19 Ohio St. 49 (1869); *State* v. *Manning*, 14 Texas 402 (1855); *People* v. *Mortimer*, 46 Cal. 114 (1873); *State* v. *Learned*, 47 Me. 426 (1859); *State* v. *Corson*, 59 Id. 137 (1871); *Com.* v. *Holley*, 3 Gray 458 (1855).

HENRY WADE ROGERS.

Court of Appeals of New York.

GIFFARD, RECEIVER, *v.* CORRIGAN, EXECUTOR.

The bare fact that a deed has been recorded is not sufficient evidence that it was delivered by the grantor, or accepted by the grantee or beneficiary. To establish these facts there must be other and further evidence that will support such a presumption, as that the deed would operate beneficially to the grantee, or that he had knowledge of the execution or recording of the deed.

THE opinion of the court was delivered by

ANDREWS, J.—The defendant McCloskey, in his verified answer, denied that he entered into the covenant of assumption contained in the deed executed by McEvoy, and alleged that the deed was made and executed without his knowledge, and that it was never delivered to or accepted by him. The parties proceeded to trial upon the issue so presented, and the other issues in the case. The plaintiff put in evidence from the register's office in West Chester county, the record of a deed dated May 8th 1878, recorded May 10th 1878, from McEvoy to the defendant, McCloskey, purporting to convey to "John McCloskey, Archbishop of New York," for the nominal consideration of one dollar, the mortgaged premises and a lot adjacent thereto, which deed contained a covenant on the part of the grantee, to assume and pay the principal sum of $3900 on the mortgage, with interest from January 9th 1869. The deed was executed by the grantor alone. The plaintiff rested his case against the defendant, McCloskey, solely upon the record. The case is bare of any circumstance or evidence showing, or tending to show, that the defendant, McCloskey, had any knowledge or information of the existence of the deed, or indeed of the existence of the mortgaged property prior to the commencement of the action, or that he was ever in possession, or that he ever had any conversation or negotiation with any one in respect to the property. There is no evidence who put the deed upon record, or how it came to be recorded. The bare fact of the record is all that appears connecting the defendant, McCloskey, with the transaction. The

grantor, McEvoy, died before the commencement of the action, and the defendant, McCloskey, a few months after the trial.

In determining the question whether the plaintiff made out a *prima facie* case of the delivery to and acceptance of the deed by the grantee, certain other facts need to be noticed. McEvoy was a Roman Catholic priest. He acquired title to the mortgaged property in 1870, from the trustees of the Father Matthew Temperance Benefit Association of Tuckahoe, a society incorporated under the Act of April 12th 1848, for the incorporation of benevolent, charitable, scientific and missionary societies. The conveyance of the property by the society to McEvoy was made under the order of the court, which authorized the conveyance to be made to him, "for the use of the Roman Catholic Church or the people of Tuckahoe;" and the deed referred to the order as the authority under which it was executed. It appeared by the petition upon which the order was granted that the society was unable to pay the mortgage, and that the value of the premises did not exceed the amount due thereon. The plaintiff, to maintain his claim that the deed from McEvoy to McCloskey was delivered and accepted, invokes the presumption that a party has accepted a benefit attempted to be conferred upon him, and that the record of a deed beneficial to the grantee is *prima facie* evidence of its delivery.

The property was conveyed to McEvoy for church purposes, and it cannot be doubted that in executing a deed to the defendant, McCloskey, it was his intention to vest the title in him as archbishop for the same purposes, whatever may be the legal effect of his conveyance, and not to vest in his grantee a personal beneficial interest in the property. It is well known that the title to church property in the Roman Catholic Church is frequently vested in the bishop. This tends to explain a transaction which would otherwise be peculiar, and how McEvoy may have executed a deed of the land to his ecclesiastical superior without his knowledge.

The ground of the presumption, from the bare record of a deed, that it has been delivered and accepted wholly fails in this case. The deed was not beneficial to the grantee. The property was heavily encumbered, probably to its full value. As has been stated, there is no evidence of any possession under the deed, or of any prior contract or negotiation between the parties, or of any knowledge in fact on the part of the grantee of the existence of the conveyance. In most of the cases where delivery of a deed has

been sought to be established without proof of the actual fact, there are circumstances which support the presumption of a delivery, in addition to the bare record of the deed.

We are of the opinion that, under the circumstances of this case, a delivery cannot be presumed from the record alone, and that the conclusion of the general term upon this point was correct. See *Jackson* v. *Phipps*, 12 Johns. 418; *Jackson* v. *Bodle*, 20 Id. 184; *Church* v. *Gilman*, 15 Wend. 656; *Elsey* v. *Metcalf*, 1 Denio 323. *Contra*, *Rathbun* v. *Rathbun*, 6 Barb. 98.

Construing the exceptions in connection with the issue raised by the pleadings, we think they fairly presented the question whether the evidence justified a finding that the defendant, McCloskey, made the covenant upon which he is sought to be charged. But as the case on this point may be changed on a re-trial, we think the court below should have ordered a new trial, and that its order should be modified in this respect.

There is another question argued by counsel, of great interest, which we do not deem it necessary to decide, as it may not again arise. The question relates to the effect of the release from the covenant of assumption executed by the executor of McEvoy to McCloskey, after the complaint in the action and the notice of *lis pendens* had been filed, but before the actual service of process on the defendant. Is it competent for a grantor of mortgaged premises whose conveyance was made subject to the mortgage, and contains a covenant of assumption by the grantee, without the consent of the mortgagee to release the grantee from the covenant so as to bar any remedy thereon against him by the mortgagee? And does it make any difference whether the release is executed before or after the mortgagee has notice of the covenant, or before or after suit commenced by him thereon. This question has never been finally adjudicated in this court, although expressions of judges are to be found bearing upon it: *Hartley* v. *Harrison*, 24 N. Y. 170; *Garnsey* v. *Rogers*, 47 Id. 233; *Dunning* v. *Leavitt*, 85 Id. 30; *Knickerbocker Ins. Co.* v. *Nelson*, 78 Id. 150.

Prior to *Burr* v. *Beers*, 24 N. Y. 178, as is shown by RAPALLO, J., in *Garnsey* v. *Rogers*, the right of a mortgagee to avail himself of the benefit of a covenant of payment made by a grantee of the mortgagor was regarded as an equitable right only, and was founded on the theory that "the undertaking of the grantee to pay off the encumbrance is a collateral security acquired by the mort-

gagor, which inures by an equitable subrogation to the benefit of the mortgagee." DENIO, J., in *Burr* v. *Beers*. Assuming this to be the true foundation of the rule, the question arises, when does this equitable right of subrogation attach? It is clear that it cannot be enforced by the mortgagee until default of the covenantor to pay the mortgage according to the terms of his covenant. But does not the equitable right of the creditor to the benefit of the covenant spring into existence cotemporaneously with the covenant itself, although he cannot then avail himself of it, and although he may never be in a situation which renders a resort to it necessary. This right does not rest on privity of contract between the covenantor and mortgagee. It is the application of an equitable principle long recognised, to work out the real justice of the transaction. If the right of the creditor to the collateral security springs into existence concurrently with the origin of the relation of principal and surety, between the mortgagor and his grantee, ought the immediate parties to the covenant, by a mere release, to be permitted to change the situation of the mortgagee, and deprive him of the security of the covenant? It is true that there is no direct contract with the mortgagee, nor is there any consideration moving between the mortgagee and covenantor. But does the absence of the consideration between these parties justify the mortgagor in cancelling a security which he has taken for his own protection, and which, at the same time, operates also as a protection to his creditors, and especially when this is done for the mere purpose of defeating the remedy of the latter. The case of *Burr* v. *Beers*, established the doctrine in this state that an action at law would lie in favor of the mortgagee against the grantee of the mortgagor on the covenant of assumption. Would the defence of a release be available when the action is in this form, assuming that it would not be available in the equitable action? In truth is the direct action on the covenant not an action founded upon the equity of the transaction, rather than upon the notion of a contract between the parties? We leave the question raised by the release in this case undecided. We prefer not to decide it until it is squarely and necessarily presented.

The order and judgment of the General Term should be modified by directing a new trial, and as so modified, affirmed, with costs to abide the event.

The authorities do not assert the rule as above laid down, that there must be something more than the act of recording a deed, to constitute a delivery; but

hold that recording, or filing for record, is *prima facie* evidence of delivery—because that act shows that the grantor intended a delivery, and, in the absence of anything to the contrary, should have effect. Delivery is *presumed*, from the act of recording or filing for record: *Guilbert* v. *Ins. Co.*, 23 Wend. 43; *Bulkley* v. *Buffington*, 5 McL. 457; *Bulkley* v. *Carleton*, 6 Id. 125; *Mitchell* v. *Ryan*, 3 O. St. 377. Not an actual delivery, nor conclusive evidence of a delivery, *Eames* v. *Phipps*, 12 Johns. 418; *Hawkes* v. *Pike*, 105 Mass. 560; but a *presumptive* or *prima facie* delivery, to stand until rebutted, or some other fact, or intention is shown: *Lawrence* v. *Farley*, 24 Hun 293; *Younge* v. *Guilbeau*, 3 Wall. 636; *Rigler* v. *Cloud*, 14 Pa. St. 361; *Kille* v. *Ege*, 79 Id. 15; *Chess* v. *Chess*, 1 P. & W. 32; *Boardman* v. *Dean*, 34 Pa. St. 252; *Van Valen* v. *Schemerhorn*, 22 How. Pr. 416; *Wilsey* v. *Dennis*, 44 Barb. 354. What facts are sufficient to rebut this presumption—this *prima facie* delivery—and show that there was no delivery, and no intention to deliver, depends upon the facts of each case: *Knolls* v. *Barnhart*, 71 N. Y. 474; *Thompson* v. *Jones*, 1 Head 576; *Deitz* v. *Farish*, 79 N. Y. 520. For instance, if the grantee gets possession of the deed by fraud or after the death of the grantor, and procures the recordation, there is no delivery: *Critchfield* v. *Critchfield*, 24 Pa. St. 100; *Van Amringe* v. *Morton*, 4 Whart. 382; *Ritter* v. *Worth*, 58 N. Y. 627; *Martin* v. *Ramsey*, 5 Humph. 349. Or where the registration was done upon certain conditions, in which case the *onus* is on the grantor: *Thompson* v. *Jones*, 1 Head 575;* *Watson* v. *Ryan*, 3 Tenn. Ch. 40. And where a parent executed a deed to his son, had the same recorded and left at the register's office until it was called for; the son knowing nothing of the transaction, and the deed was returned to the grantor on his demand; it was held that there had been no delivery: *Maynard* v. *Maynard*, 10 Mass. 456, but it is held otherwise if the grantee had obtained the deed from the registry: *Harrison* v. *Phillips Academy*, 12 Mass. 455, or assented to it, or accepted it: *Hedge* v. *Drew*, 12 Pick. 141. But where there is the mere sending of the deed to the register, without the knowledge of the grantee, and hence no act of acceptance express or implied on his part, no title passes to the grantee as against a creditor of the grantor who attached the land before the grantee had accepted the deed. *Samson* v. *Thornton*, 3 Met. 275. And where the grantor, in the absence of the grantee, left the deed with the register to be recorded, and after recordation it was given back to the grantor; this constituted *no* delivery, although the grantor may have had notice of the conveyance: *Hawkes* v. *Pike*, 105 Mass. 560. But it should be otherwise if the grantee had accepted or asserted title under it, there being, of course, no condition attached by the grantor upon placing the deed for record: *Taylor* v. *McClure*, 28 Ind. 39; *Mallett* v. *Page*, 8 Id. 364; *Stout* v. *Duning*, 72 Id. 343; *Hoffman* v. *Mackall*, 5 O. St. 124; *Baldwin* v. *Snowden*, 11 Id. 203; for the very good reason that there cannot be a delivery without an acceptance: *Fonda* v. *Sage*, 46 Barb. 109; *Foster* v. *Beardsley Scythe Co.*, 47 Id. 505; *Black* v. *Hoyt*, 33 O. St. 203. Yet it has been held that a delivery to the recorder, to be held for the grantee, is a good delivery: *Tompkins* v. *Wheeler*, 16 Pet. 106—not, however, if the grantee repudiates the deed upon receiving notice, or, in other words, fails to accept.

The rule is, a deed does not operate until delivered. There is no delivery without an acceptance. Any word or act, express or implied, which shows that the grantor intended to deliver, and the grantee intended to accept, is sufficient to constitute a good delivery. It is a question of intent, provable as any other fact; intent on behalf of the grantor to deliver, and intent on the part of the

grantee to accept, both of which can be done expressly or by implication: *Burkholder* v. *Casad*, 47 Ind. 418; *Somes* v. *Pumphrey*, 24 Id. 231. For instance, where the name of the grantee has been inserted by the grantor without the knowledge of the grantee, and the deed then placed on record by the grantor, if the grantee disavow the conveyance, as soon as the fact comes to his knowledge, there is no delivery: *Day* v. *Mooney*, 4 Hun 134; because there was no acceptance, which is necessary to constitute delivery: *Kearney* v. *Jeffries*, 48 Miss. 343; *Merrill* v. *Swift*, 18 Conn. 261; *Corbett* v. *Norcross*, 35 N. H. 99. Therefore, to constitute delivery, there must be the act of the grantor and the act of the grantee. These acts can be expressed or implied. Any act or word showing the intent is sufficient. Hence, it was held that as the acceptance can be expressed or implied, it is implied when the deed is beneficial to the grantee, or when he has notice and does not disavow it: *Kearney* v. *Jeffries*, 48 Miss. 343; *Tibbals* v. *Jacobs*, 31 Conn. 431; *Treadway* v. *Ins. Co.*, 29 Id. 71; *Hallock* v. *Bush*, 2 Root 595; *Graham* v. *Lambert*, 5 Humph. 260. The trouble is in determining what constitutes an acceptance, and as an acceptance is contained in a delivery, the question would be what constitutes a delivery: *Hopkins* v. *Leek*, 12 Wend. 105; *Utterbach* v. *Binns*, 1 McL. 242; *Fletcher* v. *Mansure*, 55 Ind. 267; *Gray* v. *State*, 9 Id. 25. First, then, what constitutes an acceptance? There will be an acceptance if the grantee fail to disavow the conveyance, as soon as the fact comes to his knowledge: *Day* v. *Mooney*, 4 Hun 134; but not when the deed is delivered to the grantee's agent to be held whilst his principal considers the question of its acceptance, though the deed be placed upon record: *Ford* v. *James*, 4 Keyes 300; s. c. 2 Abb. Dec. 159; *Carnes* v. *Platt*, 6 Rob. 270. An acceptance may be presumed from the beneficent nature of the transaction, and will not be presumed where the grantee derives no benefit, or is subject to a duty, or the performance of a trust: *Printard* v. *Bodle*, 20 Johns. 184; *Ten Eyck* v. *Richards*, 6 Cow. 617. If presumed from the benefit conferred by the deed, to rebut that presumption there must be a disavowal, and, in the latter case, an express acceptance: *Fonda* v. *Sage*, 46 Barb. 109; *Carnes* v. *Platt*, 6 Rob. 270; *Stephens* v. *Buffalo & New York City Rd. Co.*, 20 Barb. 332. The acceptance can be expressed or implied: *Foster* v. *Beardsley Scythe Co.*, 47 Id. 505. The fact of acceptance may be found from the acts of the parties, preceding, attending and subsequent to the signing, sealing, and acknowledgment of the instrument: *Dukes* v. *Spangler*, 35 O. St. 119. But in all cases there must be an acceptance to vest the grantee with title under it, because a conveyance cannot be forced upon a man: *Lloyd* v. *Giddings*, 7 Ohio, 2 pt. 53; *Kearny* v. *Jeffries*, 48 Miss. 343. A person indebted to a bank executed a mortgage for the debt, but without the knowledge of the bank, and after depositing the paper for record, sent word to the bank that such mortgage had been executed and left for record, the cashier replying that he was glad of it. In a contest for priority between the bank and a subsequent mortgagee, it was held that the facts showed a good acceptance: *Farm. & Mech. Bank* v. *Drury*, 38 Vt. 426.

What constitutes a Delivery.—There is no formality necessary: *Farrar* v. *Bridges*, 5 Humph. 411. It can be by acts or by words, expressed or implied. If the intention to make a delivery is evinced or manifested in any clear and unequivocal manner, it is sufficient, and it is a question of fact open to parol evidence and may be inferred from circumstances: Add. Cont. 7. Hence, if that intent is clear from the fact of delivery for record, it is a good delivery: *Thompson* v. *Jones*, 1 Head 576; *Nichol* v. *Da-*

vidson Co., 3 Tenn. Ch. 546; *Watson* v. *Ryan*, Id. 40. But the deed must have been properly executed, the grantor divested of the power to recall it, and grantee must have accepted it: *Brevard* v. *Neely*, 2 Sneed 165; *Kirkman* v. *Bank*, 2 Cold. 402; although the deed remain in the actual custody of the grantor: *Sedgerwood* v. *Gault*, 2 Lea 646; *Farrar* v. *Bridges*, *supra*; *McEwen* v. *Troost*, 1 Sneed 186.

It is a good delivery if the deed be delivered to a third person for the beneficiary: *Graham* v. *Lambert*, 5 Humph. 595; to a third person to be delivered to the grantee at the death of the grantor, and such deed is so delivered; the title passes upon such last delivery, and the deed takes effect as of the date of the first delivery: *Crooks* v. *Crooks*, 34 O. St. 610; to the officer taking the acknowledgment, to be delivered to the grantee whenever he called for it, where it is accepted by the grantee, although the officer retains possession: *Black* v. *Hoyt*, 33 O. St. 203. And so if the deed pass from the control of the grantor by his own act, with the declaration that it is delivered for the use of the grantee (and the grantee accepts): *Eckman* v. *Eckman*, 55 Pa. St. 269; *Arthur* v. *Bascom*, 28 Leg. Int. 284: *Steel* v. *Tuttle*, 15 S. & R. 210; *Dayton* v. *Newman*, 19 Pa. St. 194. Or if it be left with a magistrate, without instructions: *Blight* v. *Schenck*, 10 Id. 285; if the grantee accept; and he accepts if he execute a purchase-mony mortgage: *McDowell* v. *Cooper*, 14 S. & R. 269. So, too, a delivery to a third person to hand over the deed, or record the same after grantor's death: *Stephens* v. *Huss*, 53 Pa. St. 20; *Stephens* v. *Rinehart*, 72 Id. 434; *when accepted*: *Mitchell* v. *Ryan*, 3 O. St. 377. And it has been held that the deed of a wife's lands must be delivered to the grantee in her lifetime, in order to pass the estate: *Shoenberger* v. *Zook*, 34 Pa. St. 24; *Shoenberger* v. *Hackman*, 37 Id. 87. But the reason for this is not apparent. The delivery is good if made by a releasor to the agent of the releasee: *Rd.* v. *Iliff*, 13 O. St. 235, and when grantee agreed beforehand to accept: *Hoffman* v. *Mackall*, 5 O. St. 124, and when a husband delivers the joint deed of himself and wife without the knowledge of the wife, or notice of her dissent: *Baldwin* v. *Snowden*, 11 O. St. 203; and where delivered to a vendee, although upon an understanding that it should not be effective until the purchase-money be paid: *Resor* v. *O. & M. Rd. Co.* 17 O. St. 139, and where the *cestui que trust* takes the deed from the table where it has been laid for her, and then kept it in her possession until her death, this is a good delivery: *Jaques* v. *Methodist Episcopal Church*, 17 Johns. 548; s. c. 1 Johns. Ch. 450. And it has been held that a delivery is also good, even against the grantee's written promise to return the deed on demand or pay the consideration if no demand be made: *Howe* v. *Dewing*, 2 Gray 476.

On the other hand, there is no delivery if the deed be placed in the grantor's trunk, to be there kept until after his death, the grantor saying that when that happened each man could get his own: *Taylor* v. *Taylor*, 2 Humph. 597; nor if the deed be found amongst the grantor's effects after his death: *Martin* v. *Ramsey*, 5 Humph. 349; nor if possession has been obtained by fraud: *Ritter* v. *Worth*, 58 N. Y. 627; nor when the grantee disavows the conveyance as soon as the fact comes to his knowledge: *Day* v. *Mooney*, 4 Hun 134; nor if the deed be placed in hands of a scrivener on condition: *Epley* v. *Witherow*, 17 Leg. Int. 356; nor if it is given to one of several grantees without more: *Hannah* v. *Swarner*, 8 Watts 9; nor if the deed be surreptitiously or fraudulently taken from the grantor's house, and this even as to a *bona fide* purchaser: *Van Amringe* v. *Morton*, 4 Whart. 382; nor if obtained from the grantor's effects after his death without more. *Critchfield* v. *Critchfield*, 24 Penn. St. 100; though it would be

otherwise if any facts exist showing or tending to show that the grantor intended that the deed should be delivered to the grantee: *Stinger* v. *Com.*, 26 Penn. St. 422; nor the mere fact of recording: *Barr* v. *Schroeder*, 32 Cal. 610; nor delivery to a third person to await the performance of certain conditions: *Ogden* v. *Ogden*, 4 O. St. 182, and cases cited; *Lloyd* v. *Yiddings*, 7 Ohio 375. And although the intention to deliver existed at the time of execution, yet, if the deed be retained by the grantor until his death, no title passes to the grantee: *McCrea* v. *Dunlap*, 1 Johns. Cas. 114; *Stillwell* v. *Hubbard*, 20 Wend. 44; *Osterhout* v. *Shoemaker*, 3 Hill 513; *Fisher* v. *Hall*, 41 N. Y. 416; *Bryant* v. *Bryant*, 42 Id. 11; *Roosevelt* v. *Carow*, 6 Barb. 190; nor where a person in expectation of death delivers a deed to a stranger to be delivered to the grantee after the grantor's death, and he recovers, receives back the deed and lives nearly five years thereafter, and after the grantor's death the grantee obtains possession of the deed, does any title pass to the grantee, because there is no delivery of the deed: *Jacobs* v. *Alexander*, 19 Barb. 243; nor does delivery arise from the sending of the deed to a stranger, or its deposit in a public office, unless sent or deposited for the use of the grantee: *Elsey* v. *Metcalf*, 1 Den. 323; and accepted by him: *Ford* v. *James*, 4 Keyes 300; nor where the grantor before acknowledgment gives it to the grantee, but after acknowledgment keeps it: *Mills* v. *Gore*, 20 Pick. 28; or takes it for the purpose of getting from his wife a release of dower and not returning it to grantee: *Parker* v. *Parker*, 1 Gray 409; nor where the deed is delivered to a third person "until called for" and is then taken back by the grantor is there a delivery: *Maynard* v. *Maynard*, 10 Mass. 456.

JOHN F. KELLY.

Washington, D. C.

Supreme Court of Kansas.

STATE *v.* WALKER ET AL.

The mutual present assent to immediate marriage, by persons capable of assuming that relation, is sufficient to constitute marriage at common law; and such a marriage will be sustained in Kansas where its validity is directly drawn in question.

The legislature has full power, not to prohibit, but to prescribe reasonable regulations relating to marriage, and a provision prescribing penalties against those who solemnize or contract marriage contrary to statutory command is within legislative authority.

Punishment may be inflicted upon those who enter the marriage relation in disregard of the prescribed statutory requirements, without rendering the marriage itself void.

Under section 12 of the Marriage Act, all persons who enter the marriage relation, and live together as man and wife, without complying with the conditions and regulations of the act, are guilty of a misdemeanor, and subject to the punishment imposed by that section.

APPEAL from Jefferson county.

E. C. Walker and Lillian Harman were prosecuted in the Dis-